(3)

No. 90-959

In the Supreme Court of the United States

OCTOBER TERM, 1990

PATRICK W. SIMMONS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a representative of rail labor lacked standing to initiate judicial review of an Interstate Commerce Commission (ICC) order permitting the sale of one rail line and the abandonment of another, because the particular alleged injury to rail employees resulting from the transactions is not within the zone of interests protected by the Interstate Commerce Act.

2. Whether certain off-line shippers lacked standing under Article III to challenge the ICC's order permitting a rail line abandonment, because the alleged injury to the shippers would not be remedied by overturning the ICC's authorization of the abandonment.

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OPINIONS BELOW

The opinion of the court of appeals in the acquisition case (Pet. App. 3a-11a) is reported at 909 F.2d 186. The opinion of the court of appeals in the abandonment case (Pet. App. 18a-26a) is reported at 900 F.2d 1023. The decisions of the Interstate Commerce Commission (ICC) (Pet. App. 29a-73a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 16, 1990. Petitions for rehearing were denied on August 2, 1990. Pet. App. 12a-13a, 74a. Following extensions of time granted by Justice Stevens (Pet. App. 1a-2a), the petition for a writ of

certiorari was filed on December 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, governs transactions involving the acquisition and abandonment of rail lines. Under 49 U.S.C. 10901, persons seeking to acquire and begin operations over a rail line generally must first obtain the approval of the ICC. Under 49 U.S.C. 10903, a carrier generally may not abandon a rail line without the prior approval of the ICC. Congress has directed the Commission, however, to exempt from regulation transactions that otherwise require approval under the Act when the Commission finds that regulation is not necessary to carry out the national transportation policy and certain other conditions are met. 49 U.S.C. 10505.

Drawing on its authority under Section 10505, the Commission has issued a class exemption that abbreviates the procedures for noncarrier rail line acquisitions. A prospective acquirer must fulfill certain advance notice conditions in order to invoke the class exemption, and the Commission reserves the right to revoke the exemption's applicability to the acquisition of a particular line. See 49 C.F.R. 1150.31-1150.35; *Class Exemption for the Acquisition & Operation Of Railroad Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) (*Acquisition Exemption*); aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987) (Table).

Similarly, the ICC has issued a class exemption abbreviating the procedures for the abandonment of certain presumptively unneeded rail lines. These "out-of-service" lines are ones that have not generated

traffic for at least two years and carry no overhead traffic that cannot be rerouted over other lines. Again, to invoke this exemption, a carrier must fulfill certain advance notice procedures, and the Commission reserves the right to revoke the exemption's applicability to a particular line. *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) and 1 I.C.C.2d 55 (1984), remanded *sub nom. Illinois Commerce Comm'n* v. *ICC*, 787 F.2d 616 (D.C. Cir. 1986), revised, *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1986) (*Abandonment Exemption*), aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 848 F.2d 1246 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989); 49 C.F.R. 1152.50.

The Commission is required to impose certain protective conditions for the benefit of employees who are adversely affected by an abandonment, whether the abandonment is allowed under Section 10903 or under the class exemption. 49 U.S.C. 10903(b)(2), 10505(g)(2). Under the statute, these are the same benefits that are required for carrier consolidations that are governed by 49 U.S.C. 11343 (including the acquisition of an active rail line by an existing rail carrier). But for acquisitions governed by Section 10901 (including noncarrier acquisitions), the statute does not require labor protection for affected employees; instead it leaves it to the ICC's discretion whether to impose labor protective conditions. 49 U.S.C. 10901(e), 10505(g)(2); see *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2590 (1989). The ICC's policy is not to impose protective conditions on noncarrier line acquisitions unless exceptional circumstances warrant them. *Acquisition Exemption*, 1 I.C.C.2d at 815.

2. a. Relying on the procedures set forth in *Acquisition Exemption*, the Chicago Chemung Railroad

Corporation (CCRC) acquired a 3.5-mile rail line between Harvard and Chemung, Illinois, from the Chicago and North Western Transportation Company (CNW). Petitioner Patrick W. Simmons, the Illinois Legislative Director for the United Transportation Union (UTU), filed objections to the acquisition with the ICC, seeking a stay of the acquisition's consummation, and, later, a revocation of the use of the class exemption procedure. Pet. App. 4a-5a.

Simmons alleged that the CCRC operation would not be viable or efficient; that off-line shippers would be adversely affected; that CCRC's affiliation with the main shipper on the line, Seegers Grain Inc., would produce an undue concentration of market power that would adversely affect rival grain shippers and would violate 49 U.S.C. 10746 (the "commodities clause"); and that rail employees would lose jobs with CNW without being accorded labor protection. Pet. App. 36a, 45a-46a. After analyzing each of Simmons' contentions, the ICC denied the petitions for a stay and to revoke the exemption for the acquisition of the rail line at issue, *id.* at 29a-34a, 35a-47a, and rejected Simmons' petition for reconsideration. *Id.* at 48a-55a.

b. Subsequently, CNW invoked the *Abandonment Exemption* in order to abandon an adjacent 6.5 miles of track between Chemung and Poplar Grove, Illinois (immediately west of the segment acquired by CCRC). There were no shippers on that line segment, and overhead traffic had been rerouted because of a derailment that had severely damaged the segment. Pet. App. 19a-20a.

Simmons and two off-line shippers—petitioners McLay Grain Company and Edenfruit Products Company (both located west of this line segment and neither an active rail user)—objected to the abandon-

ment in petitions filed with the ICC for a stay and for a revocation of the exemption. They claimed that the abandonment of the segment (with the sale of adjacent track to CCRC) was part of a larger design by CNW that would lead to abandonment of an additional 13.4 miles of track from Poplar Grove to South Beloit, Illinois, and that it was an abuse of the class exemption for CNW to use it in conjunction with its other efforts to dispose of adjacent portions of track. They also argued that the ICC's environmental analysis was inadequate, because it did not include the effects of abandoning the remaining portion of the line to South Beloit. The ICC rejected the petitions for a stay and to revoke the exemption for the abandonment of this line. Pet. App. 56a-62a, 63a-73a.

3. a. Simmons then filed a petition for judicial review of the ICC's decision in the acquisition case. Although observing that substantial record evidence appeared to support the ICC's decision, Pet. App. 7a, the court of appeals did not reach the merits because it dismissed Simmons' petition for lack of standing. The court concluded that although Simmons satisfied Article III requirements for standing, he failed to satisfy prudential limits on standing because the injury he alleged does not fall within the zone of interests protected by the pertinent provisions of the Interstate Commerce Act. Pet. App. 8a-11a.

The court treated Simmons as petitioning on behalf of the UTU and its members, and, therefore, as representing the interests of rail labor. Pet. App. 3a-4a, 7a-8a. But, the court explained, the only injury alleged on behalf of rail labor was that "members of the UTU will lose their jobs due to the sale of the line." *Id.* at 8a. That injury, the court found, did not satisfy the zone of interest test as explicated

in *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987). Pet. App. 8a-10a.

To determine the zone of interests protected by the Act, the court looked to the rail transportation policy expressed in 49 U.S.C. 10101a. It observed that the only provision applicable to rail employees, Section 10101a(12), encourages "fair wages and safe and suitable working conditions in the railroad industry." Examining that provision, the court concluded that the Act is not intended "to protect a rail employee's interest in retaining his job." Pet. App. 10a. Accordingly, "the Act's zone of interests does not encompass the only [labor] interest which Simmons alleges the ICC's action threatens." *Ibid.* The court also found that, because Simmons lacked standing in his own right, he did not have standing to represent the public interest. *Id.* at 10a-11a, citing *Sierra Club* v. *Morton*, 405 U.S. 727, 737 (1972).[1]

b. Both Simmons and the two off-line shippers sought judicial review of the ICC's decisions in the abandonment case. Simmons again alleged that rail employees would lose jobs due to the abandonment. The two shippers alleged that they would be competitively injured vis-a-vis competing shippers on the line segment sold to CCRC, and they challenged the adequacy of the ICC's environmental analysis. Although noting that substantial evidence appeared to support the ICC on the merits, Pet. App. 23a, the court of appeals dismissed the petitions for review on standing grounds. *Id.* at 18a-26a.

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[1] Two judges dissented from the denial of rehearing en banc, arguing that rehearing was warranted to examine whether the panel had read the zone of interests test too narrowly. Pet. App. 13a-17a. Those judges believed that it was possible that the panel had "undermine[ed] Congress's intention that the voice of labor be heard." *Id.* at 16a.

The court first held that the shipper petitioners lacked Article III standing to bring their competitive-injury claims. Applying the analysis set forth in *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982), the court found that the shippers met the requirement of injury-in-fact, but not the requirement that the injury be fairly traceable to the ICC's decision allowing the abandonment. Pet. App. 23a. The court explained that the shippers' alleged injuries would be redressed only by repair of the damaged track, but the ICC's challenged action pertained only to whether the line may be abandoned, not whether it must be repaired. It noted that there was no evidence that CNW "would likely repair the derailment if the request to abandon were denied" and any expectation to the contrary was "unadorned speculation." *Id.* at 24a.

Next, the court dismissed the shippers' procedural challenge to the ICC's environmental analysis on grounds that it failed the injury-in-fact test. Pet. App. 25a. Finally, the court dismissed Simmons' petition by reiterating its conclusion in the acquisition case that "rail employees' interests in retaining their jobs are not within the zone of interests protected by the Interstate Commerce Act." *Id.* at 26a.

ARGUMENT

1. Petitioner Simmons contends (Pet. 14-19) that the court of appeals erred in holding that the interest of rail employees in retaining their jobs is not within the zone of interests protected by the Interstate Commerce Act. The court's holding, however, properly applies this Court's zone of interest jurisprudence and does not warrant further review.

a. The Administrative Orders Review Act, commonly known as the Hobbs Act, 28 U.S.C. 2341 *et seq.*, authorizes judicial review in the court of appeals at the behest of a "party aggrieved" by a final ICC order. 28 U.S.C. 2321, 2342(5), 2344. The Hobbs Act, however, does not authorize judicial review at the behest of any participant in an administrative proceeding, or even one who may be adversely affected by the agency's action; rather, a party must establish that the injury he alleges is within the zone of interests protected by the statute at issue.[2]

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[2] *Kansas City S. Indus., Inc.* v. *ICC*, 902 F.2d 423, 429-430 & n.3 (5th Cir. 1990) ("To determine whether a petitioner is aggrieved under section 2344, we generally incorporate traditional article III and prudential standing analysis"; finding zone of interests test satisfied on the particular facts); *National Treasury Employees Union* v. *United States MSPB*, 743 F.2d 895, 910 (D.C. Cir. 1984) ("The courts that have considered the scope of § 2344's 'aggrieved party' language have engaged in traditional standing doctrine analysis," including the zone of interests inquiry). Courts have also applied the zone of interests test, which "is most usefully understood as a gloss on the meaning" of 5 U.S.C. 702, *Clarke*, 479 U.S. at 400 n.16, under other statutes that permit review to "aggrieved" parties or persons. See, *e.g.*, *Chicago Mercantile Exch.* v. *SEC*, 883 F.2d 537, 541 (7th Cir. 1989) ("person aggrieved" language in 15 U.S.C. 78y(a) of the Securities Exchange Act of 1934), cert. denied, 110 S. Ct. 3214 (1990); *Panhandle Producers & Royalty Owners Ass'n* v. *Economic*

"In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are * * * marginally related to or inconsistent with the purposes implicit in the statute." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Applying that test, the court of appeals correctly concluded that petitioner's allegations of injury do not fall within the zone of interests protected by the Interstate Commerce Act.

The Interstate Commerce Act recognizes that rail labor has a significant interest in transactions involving carriers, but it accommodates that interest in particular ways. The Act does not guarantee that rail employees will not lose their jobs as a result of an ICC-authorized rail acquisition or abandonment. Rather, it authorizes the ICC to impose compensatory labor protective provisions in connection with

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Regulatory Admin., 822 F.2d 1105, 1108-1109 (D.C. Cir. 1987) ("party * * * aggrieved" language in 15 U.S.C. 717r(b) of the Natural Gas Act); *Orange Park Florida T.V., Inc.* v. *FCC*, 811 F.2d 664, 673 (D.C. Cir. 1987) ("person * * * aggrieved" language in 47 U.S.C. 402(b)(6) of the Federal Communications Act). In *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-477 (1940), this Court held that a competitor to an FCC licensee was "aggrieved" or otherwise "adversely affected" by the FCC's grant of a license to a competitor, even though the relevant statute did not protect against economic injury to competitors. *Sanders* remains good law on its facts, but the opinion predates this Court's elaboration of the zone of interests test and does not reflect contemporary developments in standing doctrine. In any event, because the statutory language examined in *Sanders* is broader than that of the Hobbs Act, *Sanders* does not suggest that a "zone" inquiry is unnecessary here, and petitioner does not so contend.

those transactions. 49 U.S.C. 10901(e) (new operations), 10903(b)(2) (abandonments), 11347 (general labor protection provision). Protective provisions serve to cushion a transaction's consequences to rail labor while allowing the transaction to go forward, thereby promoting the congressional policy to obtain the benefits of efficiency producing transactions. Cf. *United States* v. *Lowden*, 308 U.S. 225 (1939).

If petitioner had sought judicial review of the ICC's denial of compensatory labor protections in the acquisition case, see Pet. App. 46a, he would have had standing to raise that claim. But petitioner did not do so. Nor did petitioner contest the adequacy of the ICC's customary labor protections for abandonment transactions, which the ICC imposed on CNW here.[3] See *Chicago & N.W. Transp. Co.—Abandonment Exemption*, 53 Fed. Reg. 40,281 (Oct. 14, 1988). Finally, petitioner did not seek review on the basis of an injury to wage levels or working conditions, which might have fallen within the scope of the Act's general rail transportation policy, one component of which is "to encourage fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. 10101a(12). Rather, petitioner's alleged injury arises solely from the possibility that certain rail employees might suffer unemployment as a result of the transactions authorized by the ICC, and he seeks to use that injury as a springboard for challenging the transactions themselves. Pet. App. 8a, 26a.

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[3] The Commission's decision in *Oregon Short Line R.R.-Abandonment-Goshen*, 360 I.C.C. 91 (1979), sets forth the standard labor conditions attached to ICC abandonment authorizations.

Unemployment injury, however, is not a basis for seeking review of alleged violations that have nothing to do with the labor provisions of the Act. Not only does the Act "not explicitly provide for the preservation of jobs as a goal in and of itself," [4] it would be contrary to the Act's policy to disallow rail transactions solely in order to avoid potential unemployment on the part of rail employees. Indeed, at the time Congress added the labor protection provisions in the Transportation Act of 1940, ch. 722 § 7, 54 Stat. 906-907—the predecessor to 49 U.S.C. 11347—it specifically rejected a proposal, known as the Harrington Amendment, that would have accomplished that objective.

The Harrington Amendment provided that no transaction would receive ICC approval if it would result in the "unemployment or displacement of employees of the carrier[s]." 84 Cong. Rec. 9882 (1939). The Amendment was defeated after the ICC warned that it would impede transactions necessary to secure the health of the railroad industry, and that, if such transactions were blocked, in the long run more rail jobs would be lost.[5] In *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961), this Court reviewed the debate surrounding the defeated Harrington Amendment and concluded that authoritative explanations

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[4] Pet. App. 17a (Cudahy, J., dissenting from the denial of rehearing en banc).

[5] See Staff of House Legislative Comm. on Intersate Commerce Comm'n, 76th Cong., 3d Sess., *Omnibus Transportation Legislation* 67 (Comm. Print 1940); cf. *Railway Labor Ass'n* v. *United States*, 339 U.S. 142, 151 (1950) (noting that the Harrington Amendment "threatened to prevent all consolidations to which it related").

of the "final version [of the labor protective provision] clearly reveal an understanding that compensation, not 'job freeze,' was contemplated" by the Act. *Id.* at 176; see also *id.* at 172-179 (holding that the Act does not require that employees be retained on the payroll of the surviving carrier in a regulated transaction; compensatory arrangements are sufficient).

Against that background, the unemployment injury alleged by petitioner is not within the zone of interests protected by the Act. Although the zone of interests test may not be "especially demanding," and does not require a "congressional purpose to benefit the would-be plaintiff," it does exclude "plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 479 U.S. at 397 n.12, 399-400. That is exactly the case here. Far from being within the zone of interests protected by the Act, it is inconsistent with the Act's policy to permit rail labor to challenge ICC orders with the goal of seeking perpetual employment for represented employees.[6]

Petitioner gains no support (Pet. 17-18) from *United States* v. *Lowden*, *supra*. In that case, which antedated the ICC's specific statutory authority to impose labor protective provisions, the Court held that the ICC could impose such compensatory arrangements (like those now authorized by 49 U.S.C.

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[6] Cf. *National Fed'n of Fed. Employees* v. *Cheney*, 883 F.2d 1038, 1044-1447 (D.C. Cir. 1989) (federal employees and labor unions cannot challenge decision to contract-out certain services; because the relevant statute contemplates that some employees would be terminated under the budgeting process, the statute is "fundamentally inconsistent with the interests asserted by" the plaintiffs), cert. denied, 110 S. Ct. 3214 (1990).

11347) in order to further the general policy of the Act to facilitate railroad consolidations. 308 U.S. at 229, 238. *Lowden* does not support petitioner's more radical thesis that it is within the Act's zone of interests to prevent such transactions altogether to forestall rail labor unemployment.

Petitioner's claim to standing fails for an additional reason: the particular issues on which he sought judicial review are not based on rail labor concerns at all, but are based on alleged violations of provisions designed to protect shippers and competitors. Violations of those provisions are entirely unrelated to the injury alleged by petitioner; accordingly, he cannot establish standing to assert them. Cf. *Water Transport Ass'n* v. *ICC*, 819 F.2d 1189, 1193-1194 & n.33 (D.C. Cir. 1987) (water carriers were not within the zone of interests protected by a requirement for public dissemination of the terms of ICC-filed rail contracts); *Aluminum Co.* v. *United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) (rail shipper was not within the zone of interests protected by a provision allowing ICC review of state decisions at the behest of rail carriers).[7] If there were violations of the provisions on which petitioner relies, they could have been challenged by a party with an injury within the zone of interests of the relevant provisions.[8]

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[7] See *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990) (a plaintiff under the Administrative Procedure Act, 5 U.S.C. 702, "must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.").

[8] Although one of the issues presented in *Air Courier Conference* v. *American Postal Workers Union*, No. 89-1416 (ar-

Finally, the court of appeals properly rejected petitioner's contention (Pet. 18) that he had standing as a representative of the public. Standing must flow from the particular injury asserted by the petitioning party before public interest arguments may be advanced. *Sierra Club* v. *Morton*, 405 U.S. 727, 737 (1972).

b. Relying on 49 U.S.C. 10328(a), petitioner contends (Pet. 14) that rail labor enjoys "an absolute right to be heard in any proceeding under the Interstate Commerce Act that affects the employees." Section 10328(a) states: "Designated representatives of employees of a carrier may *intervene* and be heard in a proceeding arising under this subtitle that affects those employees" (emphasis added). Rather than authorizing rail employees to initiate judicial review—as petitioner did here—that provision is narrowly tailored to permit intervention in cases that are already pending.

Petitioner errs in arguing (Pet. 14) that Congress must have intended to authorize judicial review at the behest of rail labor in any case in which it par-

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gued Nov. 28, 1990), bears some resemblance to the issue presented here, we do not believe that the Court need hold the instant petition for the decision in that case. In *Air Courier Conference*, we have argued that the union's alleged injury (reduction of employment opportunities) does not come within the zone of interests protected by the postal statutes whose violation the union alleged in its complaint under the APA. We have also argued that the APA does not apply at all in that case. If the Court accepts either argument, its holding would be consistent with (and perhaps supportive of) the court of appeals' decision here. But even if the Court decides otherwise in *Air Courier Conference*, this case is distinguishable because of the particular scheme of regulation under the Interstate Commerce Act, and the conflict between petitioner's claim of injury and the policy of the Act.

ticipates administratively. Participation in agency proceedings does not, in and of itself, confer judicial standing. *Alexander Sprunt & Son* v. *United States*, 281 U.S. 249, 255 (1930); *Competitive Enter. Inst.* v. *United States Dep't of Transp.*, 856 F.2d 1563, 1565 (D.C. Cir. 1988). And it is perfectly logical for Congress to encourage intervention by rail labor in pending proceedings under a fairly lenient standard, while requiring a party who wishes to initiate a new judicial proceeding to establish that it satisfies the usual prudential requirements for invoking the court's jurisdiction.

For the same reasons, petitioner's reliance (Pet. 14-15) on *Railroad Trainmen* v. *Baltimore & O. R.R.*, 331 U.S. 519, 529 (1947), and *American Trucking Ass'ns* v. *United States*, 355 U.S. 141, 144 (1957), is misplaced. Those cases construed the predecessor to Section 10328(a) to authorize rail labor to *intervene* in a pending suit to enforce an ICC order; the Court had no occasion to consider whether that provision authorizes the institution of new proceedings for review of an agency order under the Hobbs Act.[9]

c. At bottom, petitioner's standing arguments rest on the mistaken premise that "[t]his is the first known instance * * * where standing has been denied to railroad labor in proceedings in which job elimination is a consideration." Pet. 13. Despite the impressive breadth of this claim, petitioner fails to sup-

[9] Although the opinion in *American Trucking Ass'ns* uses the phrase "standing to sue," the Court relied on the provision authorizing intervention, 355 U.S. at 144, and the status of the labor representative as an "intervening plaintiff" is made clear by the identification of counsel in the district court opinion, *American Trucking Ass'ns* v. *United States*, 144 F. Supp. 365, 366 (D.D.C. 1956).

port it with citations to decisions from any other court of appeals.[10] Nor are we aware of any decision involving zone of interests analysis that creates an intercircuit conflict on the standing of rail labor.[11] Representatives of rail labor have often raised claims based on violations of provisions of the Act that are specifically intended to protect labor interests,[12] and have participated in proceedings in which other parties litigated more general transportation issues.[13] But no court of appeals appears to have found the zone of interests test to be satisfied by rail labor in a case like this one.

2. The off-line shippers contend (Pet. 19-20) that the court of appeals erred in finding that they failed to satisfy Article III standing requirements in the abandonment case. Those petitioners do not rely on a claim of environmental standing in this Court, but

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[10] That petitioner may have been permitted to raise similar claims in the Seventh Circuit prior to the decision in this case, see Pet. App. 13a n.1, creates no conflict warranting this Court's attention.

[11] In *Brotherhood of Ry. Carmen* v. *ICC*, 917 F.2d 1136 (8th Cir. 1990), the court did reject the ICC's argument that rail labor's alleged injuries were too speculative to show Article III standing, but, after stating that the standing issue "merge[d]" with one of the arguments on the merits, the court went on to reject rail labor's general challenges to the ICC's orders. *Id.* at 1137. Because the brief opinion in *Carmen* did not discuss the zone of interests issue, that decision, ultimately adverse to rail labor, does not suggest that the Eighth Circuit would accept petitioner's standing in a case like this one.

[12] See, *e.g.*, *Railway Labor Executives' Ass'n* v. *United States*, 791 F.2d 994 (2d Cir. 1986); *Railway Labor Executives' Ass'n* v. *United States*, 819 F.2d 1172 (D.C. Cir. 1987).

[13] See, *e.g.*, *Illinois Commerce Comm'n* v. *ICC*, *supra*.

they do assert Article III standing in their capacity as shippers who might suffer competitive injury as a result of the abandonment of the track. The court of appeals correctly concluded that reversal of the ICC's decision would not remedy that alleged injury, and the court's fact-bound ruling does not merit this Court's review.

The court of appeals based its decision on the finding that the competitive harm asserted by the off-line shippers is not traceable to the ICC's abandonment decision and would not be redressed by overturning it. The abandoned track is already out of service; petitioners would not benefit from reversal of the ICC's decision unless CNW on its own decided to restore the damaged track and once again route traffic over it.[14] But there is nothing in the record that suggests that CNW would do so if the ICC's authorization of the abandonment were reversed. Pet. App. 24a. Short of speculation, petitioners do not claim otherwise. Accordingly, the court correctly concluded that any injury petitioners alleged would not be redressed by a ruling in their favor.

Petitioners err in contending (Pet. 18-19) that the court of appeals' decision conflicts with *Chicago &*

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[14] Routing selections are within the carrier's management discretion, because it is assumed that a carrier will maintain the most efficient routes and aggregate traffic in order to minimize costs. *Illinois Commerce Comm'n* v. *ICC*, 848 F.2d at 1250. See *Illinois* v. *ICC*, 698 F.2d 868, 873 (7th Cir. 1983) (acknowledging well-established principle that the routing of overhead traffic and the selection of alternate routes is a matter of managerial discretion); cf. *Chesapeake & Ohio Ry.* v. *United States*, 704 F.2d 373, 377 (7th Cir. 1983) (shipper is usually indifferent whether his shipment travels on direct or circuitous route provided there is no price difference).

N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). That case, which reversed a state court judgment in favor of a shipper, holds only that when the ICC has approved a carrier's decision to abandon a line, the Act preempts a shipper's suit claiming that the carrier has violated state-law duties in refusing to provide service on the abandoned track. The case does not address Article III's standing requirements, in reversing a judgment that had been entered against the petitioner railroad. Cf. *Asarco Inc.* v. *Kadish*, 109 S. Ct. 2037, 2045-2046 (1989). No question of redressability of the plaintiff's alleged injury was involved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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